IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

DAN HAVEL and DEAN RUCK, Plaintiffs, v. HONDA MOTOR COMPANY LTD., HONDA MOTOR EUROPE LTD., HONDA OF THE U.K. MANUFACTURING LIMITED, DENTSU McGARRY BOWEN LLC, DENTSU McGARRY BOWEN UK LTD, THE MILL (FACILITY) LIMITED, THE MILL GROUP, INC., ROGUE FILMS LTD., and DOES 1-3, Defendants.	§ § § § § § § § § § § § § § §	Civil Action No. 4:13-CV-01291

DEFENDANTS MOTION TO DISMISS
DUE TO FORUM NON CONVENIENS

TABLE OF CONTENTS

Page

TABLE OF CONTENTS ii

INDEX OF AUTHORITIES iv

I. Nature and Stage of the Proceedings 1

II. Issues to Be Ruled on and the Standard of Review 2

A. Issue to be ruled upon 2

B. Standard of review for determining a motion to dismiss due to *forum non conveniens* 2

III. Summary of Argument 3

IV. Argument 4

A. The Plaintiff's Claims 4

B. The Facts 5

C. This Lawsuit Concerns Alleged Copyright Infringement in the United Kingdom by UK Companies in Violation of UK Copyright Law, and Should Be Dismissed in Favor of a UK Forum 8

1. Step One: The United Kingdom is an Available and Adequate Alternative Forum 8

a) The relevant Defendants are amenable to process in the UK 8

b) United Kingdom courts are readily available to the Plaintiffs and are adequate to adjudicate their claims 9

2. Step Two: The United Kingdom is the Forum Best Suited to this Litigation 11

a) The "Private Factors" Warrant Dismissal in Favor of the UK 11

(1) The witnesses and documents are in the United Kingdom 11

(2) Compulsory process is unavailable for attendance of foreign witnesses in Texas, and the costs of obtaining attendance of witnesses weighs against Texas forum 16

(3) There is no possibility of viewing the premises 17

(4) The practical problems of a trial in Texas weigh against a Texas forum 17

b) The "Public Factors" Also Warrant Dismissal in Favor of a UK 19

(1) Administrative difficulties 19

(2) The United Kingdom has the local interest in having alleged violations of UK copyright law resolved at home 20

(3) The need to determine, interpret and apply UK law weighs heavily in favor of a UK forum 20

(4) Texas citizens need not be burdened with jury duty to determine whether UK companies violated UK law 21

V. Conclusion 21

CERTIFICATE OF SERVICE 22

INDEX OF AUTHORITIES

Cases **Page(s)**

Coakes v. Arabian American Oil. Co.,
831 F.2d 572 (5th Cir. 1987) 17

Dickson Marine, Inc. v. Panalpina, Inc.,
179 F.3d 331 (5th Cir. 1999) 18

DTEX LLC v. BBVA Bancomer, S.A.,
508 F.3d 785 (5th Cir. 2007) 3, 4, 8, 9, 11, 16, 17, 19

Dunn v. Svitzer,
885 F. Supp. 980 (S.D. Tex. 1995) 10, 16

Glazier Group, Inc. v. Mandalay Corp.,
No. H-06-2752, 2007 WL 2021762 (S.D. Tex. July 11, 2007) 18

Gulf Oil Corp. v. Gilbert,
330 U.S. 501 (1947) 11

In re Air Crash,
821 F.2d 1147 (5th Cir. 1987) (en banc) 11

Lucasfilm v. Ainsworth,
[2011] UKSC 39 [105] 9

Magnin v. Teledyne Continental Motors,
91 F.3d 1424 (11th Cir. 1996) 10

NCR Corp. v. Korala Associates Ltd.,
No. 3:04-cv-407, 2009 WL 414672 (S.D. Ohio Feb. 18, 2009) 4, 16

Perez & Compania (Cataluna), S.A. v. M/V Mexico I,
826 F.2d 1449 (5th Cir. 1987) 16

Piper Aircraft Co. v. Reyno,
454 U.S. 235 (1981) 3, 4

Quackenbush v. Allstate Ins. Co.,
517 U.S. 706 (1996) 3

Randolph v. Dimension Films,
634 F. Supp.2d 779 (S.D. Tex. 2009) 15

Reid-Walen v. Hansen,
933 F.2d 1390 (8th Cir. 1991) 21, 22

Stewart v. Adidas A.G.,
No. 96 Civ. 6670, 1997 WL 218431 (S.D.N.Y. April 30, 1997) 17, 20, 21

Tjontveit v. Den Norske Bank ASA,
997 F. Supp. 799 (S.D. Tex. 1998) 10, 20, 21

Zermeno v. McDonnell Douglas Corp.,
246 F. Supp.2d 646 (S.D. Tex. 2003) 16, 21

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DEFENDANTS' MOTION TO DISMISS
DUE TO *FORUM NON CONVENIENS*

TO THE HONORABLE JUDGE LEE H. ROSENTHAL:

Defendants Honda Motor Co., Ltd., Honda Motor Europe, Ltd., Honda of the U.K. Manufacturing, Ltd., Dentsu McGarry Bowen, LLC, Dentsu McGarry Bowen UK Ltd., The Mill (Facility) Limited, The Mill Group, Inc. and Rogue Films Ltd., ("Defendants"), move to dismiss for *forum non conveniens* and would respectfully show:[1]

I. Nature and Stage of the Proceedings.

The Plaintiffs are two Houston residents who allege they created a sculpture known as "Inversion." Amend. Comp. ¶ 3. Plaintiffs allege that Inversion was created in Houston in 2005 and published on May 1, 2005. *Id.* ¶ 16. Plaintiffs claim that Inversion was a sculpture made from the wooden boards of a house that were shaped into a conical structure leading from the

[1] All Defendants have filed a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction, and file this motion subject to that motion to dismiss.

front through to the back of the house. *Id.* ¶ 17. Inversion was a temporary creation that was destroyed in 2005 shortly after it was created. Plaintiffs allege they own the copyright in Inversion and "all derivative works pertaining thereto." *Id.* ¶ 18. Plaintiffs allege they applied for and received a certificate of copyright registration from the U.S. Copyright Office for Inversion on February 20, 2013, *id.* ¶ 16, eight years after it was torn down.

Plaintiffs allege that a European advertising campaign for the Honda CR-V compact sport utility vehicle infringed their copyright in Inversion. Amend. Comp. ¶¶ 28-33. Plaintiffs originally sued nine defendants, alleging against all nine claims of copyright infringement under United States and United Kingdom copyright law, plus pendant state law claims arising from the same facts. *See* Original Comp. ¶¶ 24-38. Almost none of the nine defendants had anything to do with the Honda advertisement at issue. *See* Defendants' American Honda Motor Co., Inc. and Honda North America, Inc.'s Rule 12(b)(6) Motion to Dismiss (Doc. # 15); Defendants Honda Motor Co., Ltd., etc. Rule 12(b)(2) Motion to Dismiss (Doc. 16). Numerous US-based entities were named in an apparent attempt to make the case appear connected to the United States.

After the originally-named defendants moved to dismiss, Plaintiffs filed a First Amended Complaint (Doc. 25). The amended complaint dropped four U.S.-based defendants: American Honda Motor Co., Inc., Honda North America, Inc., Dentsu America LLC, and Dentsu Holdings USA, Inc. *Id.* The amended complaint added three foreign entities, Honda Motor Europe Ltd., Honda of the U.K. Manufacturing Limited, and The Mill (Facility) Limited, plus three foreign Doe defendants alleged to be located in Ireland, Norway and Italy. *Id.* ¶¶ 6-7, 11, 15, 23. The Amended Complaint continues to allege the same claims of copyright infringement under U.S. and U.K. law, and pendent state law claims. Amend. Comp. ¶¶ 28-41.

II. Issue to Be Ruled on and the Standard of Review.

A. Issue to be ruled upon.

Should this Court dismiss this case on *forum non conveniens* grounds, given that the allegedly infringing advertisement (1) was produced in the United Kingdom and Canada by UK companies; (2) advertised a product manufactured in the UK and sold in the UK and Europe; (3) was aired in the UK and Europe for a foreign market; and all the witnesses with knowledge of the alleged infringement and the damages that the Plaintiffs seek to recover – plus all the relevant documents – are located in the UK and Europe?

B. Standard of review for determining a motion to dismiss due to *forum non conveniens*.

The *forum non conveniens* determination is committed to the sound discretion of the trial court. *Piper Aircraft Co. v. Reyno,* 454 U.S. 235, 257 (1981). The doctrine proceeds from the premise that under certain circumstances, "federal courts can relinquish their jurisdiction in favor of another forum." *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 722 (1996). Analyzing *forum non conveniens* involves a two-step process.

First, "the court must determine whether there exists an alternative forum." *Piper Aircraft Co.*, 454 U.S. at 254, n. 22. In doing so, the "court considers the amenability of the defendant to service of process and availability of an adequate remedy in the alternative forum." *DTEX LLC v. BBVA Bancomer, S.A.*, 508 F.3d 785, 794 (5th Cir. 2007).

Second, the court must determine which forum is best suited to the litigation. *Piper Aircraft*, 454 U.S. at 255; *DTEX*, 508 F.3d at 794. "In performing this second step, a court must consider whether certain private and public interest factors weigh in favor of dismissal." *DTEX*, 508 F.3d at 794.

The defendant carries the burden of persuading the court to dismiss on *forum non conveniens* grounds. *DTEX*, 508 F.3d at 794. "Ordinarily, a strong favorable presumption is applied to the plaintiff's choice of forum;" however, the plaintiff's choice "is not dispositive," even for U.S. citizens. *Id.* at 795.

> Citizens or residents deserve somewhat more deference than foreign plaintiffs, but dismissal should not be automatically barred when a plaintiff has filed suit in his home forum. As always, if the balance of conveniences suggests that trial in the chosen forum would be unnecessarily burdensome for the defendant or the court, dismissal is proper.

Piper Aircraft, 454 U.S. at 256 n. 23. "[T]he ultimate inquiry is where trial will best serve the convenience of the parties and the interests of justice." *DTEX*, 508 F.3d at 794 (citations omitted). *See NCR Corp. v. Korala Associates Ltd.*, No. 3:04-cv-407, 2009 WL 414672, *1-2 (S.D. Ohio. Feb. 18, 2009) (dismissing lawsuit on *forum non conveniens* grounds in favor of Scottish courts, despite plaintiff's choice of a U.S. venue).

III. Summary of Argument.

This Court should dismiss the Plaintiffs' claims because the United Kingdom is far and away the appropriate forum for this lawsuit. The Plaintiffs allege claims based on a television advertisement created in the United Kingdom by London-based companies that aired on European television to promote European Honda sales. The advertisement was not aired in the United States and was not used to advertise U.S. sales of Honda motor vehicles.

The Plaintiffs originally sued nine defendants, only two of which were involved in the production of the Honda advertisement at issue. The Plaintiffs have dropped three U.S. defendants and added three U.K. defendants, plus three foreign Doe defendants. None of the foreign defendants are subject to personal jurisdiction in this forum. The two remaining U.S. defendants are New York-based defendants that were not involved in production of the advertisement and which are not subject to jurisdiction in Texas. The Plaintiffs' rearrangement of defendants has only emphasized that this lawsuit should have been brought in the United Kingdom, not here.

Given the locus of alleged wrongful activity, the Plaintiffs' infringement claims arise primarily, if not solely, under the laws of the United Kingdom. The courts in the UK are available and adequate to adjudicate those claims, and there is no doubt that UK courts would have jurisdiction over the entities that commissioned and produced and aired the advertisement.

All witnesses and documents relevant to the Plaintiffs' claims of infringement and damages are located in London and Europe. Many important witnesses are not under the control of the Defendants and will not be subject to compulsory process in this forum, even if this Court could exercise personal jurisdiction over the Defendants.

Because an alternative and adequate forum is available in the United Kingdom, and because all of the private and public factors that are considered in determining a *forum non conveniens* motion strongly favor dismissal, this Court should grant the Defendants' motion and permit this action to be brought and adjudicated in the appropriate forum.

IV. Argument.

This lawsuit complains of alleged copyright infringement committed by foreign companies taking place in the United Kingdom and Europe, allegedly in violation of UK law. This Court's jurisdiction over any of the Defendants is doubtful and, as shown below, all witnesses with knowledge of production and airing of the advertisement are located overseas, as well as all relevant documents, making the United Kingdom the proper forum for a lawsuit alleging foreign copyright infringement.

A. The Plaintiffs' Claims.

The Plaintiffs initially sued a multitude of defendants, almost none of whom were involved in the advertisement at issue. Out of either lack of information or a desire to make this lawsuit appear U.S.-based, the Plaintiffs sued three Honda entities, three Dentsu entities, and a New York editing company, none of which commissioned, worked on, or aired the ad.[2]

Only two of the originally-named defendants, McGarry Bowen UK and Rogue Films Ltd., participated in the production of the advertisement. Both are based in the United Kingdom. The Honda entity that commissioned and used the advertisement, Honda Motor Europe Ltd., is also located in Europe, as is the manufacturing entity that the Plaintiffs have added (even though it was not involved in production of the advertisement), Honda of the U.K. Manufacturing, Ltd. The other new defendants are likewise located in the UK or Europe.

B. The Facts.

In 2012, Honda Motor Europe Ltd. ("Honda Motor Europe") invited Defendant Dentsu McGarry Bowen UK Ltd. ("McGarry Bowen UK"), to make a "pitch" to Honda to be hired to produce an advertising campaign to launch the Honda CR-V in Europe. Ex. 6 ¶ 8. McGarry Bowen UK is a London-based advertising agency that does no work in the United States. *Id.* ¶¶ 3-6.

For the "pitch" to Honda Motor Europe, McGarry Bowen UK employees in London developed the concept of a driver driving into a "portal" to another dimension, to convey the experience of owning and driving the new Honda CR-V. Ex. 6 ¶ 8. McGarry Bowen UK pitched its concept to Honda Motor Europe at its London office on June 22, 2012 and won the job. *Id.* Honda Motor Europe and McGarry Bowen UK then entered into an agreement covering the production of the television advertisement for the European CR-V campaign. *Id.*

[2] *See* American Honda Motor Co., Inc. and Honda North America, Inc.'s Rule 12(b)(6) Motion to Dismiss or, in the Alternative, Rule 12(e) Motion for More Definite Statement (Doc. #15); Defendants' Rule 12(b)(2) Motion to Dismiss for Lack of Personal Jurisdiction (Doc. #16).

McGarry Bowen UK retained Sam Brown, a director affiliated with Rogue Films Ltd., a London production company, to direct the ad. Ex. 6 ¶ 9. Mr. Brown is a UK resident. *Id.* ¶ 19. McGarry Bowen UK also retained a London editing company, Defendant The Mill (Facility) Limited ("The Mill UK") to provide editing and digital effects. *Id.* ¶ 9. Helen Whiteley, an independent television producer and UK resident, provided substantial production services during the development of the advertisement. *Id.* ¶ 20. David Prys-Owen, an independent UK consultant, was retained to give Honda Motor Europe an independent opinion regarding whether McGarry Bowen UK's budget for the advertisement was appropriate. *Id.* ¶ 21.

All creative work on the advertisement was done in London. Ex. 6 ¶¶ 8-10. The McGarry Bowen UK creative team, including the primary creative directors, executive creative directors and account executives, was located in London. *Id.* ¶ 18. The live-action video was filmed in Vancouver, Canada. Ex. 6 ¶ 10. Post-production editing and digital effects were done by The Mill UK in London. *Id.* None of the Defendants' work in developing, producing or creating the advertisement was done in the United States or Texas. *Id.*

The Honda CR-V advertisement was used solely for Honda's European advertising campaign. Ex. 6 ¶ 15. Honda Motor Europe retained Starcom MediaVest UK Ltd., to make the European media purchases to air the advertisement. *Id.* ¶ 23. Although the advertisement was posted on the McGarry Bowen and The Mill websites as examples of their work, Ex. 6 ¶ 16; Ex. 7 ¶ 8, the advertisement was not aired in the United States as any part of a Honda television advertising campaign or otherwise. Ex. 1 ¶ 12; Ex. 2 ¶ 6.

C. This Lawsuit Concerns Alleged Copyright Infringement in the United Kingdom by UK Companies in Violation of UK Copyright Law and Should Be Dismissed in Favor of a UK Forum.

Dismissal is appropriate because (1) the relevant Defendants are amenable to process in the United Kingdom, which provides an available and adequate forum; and (2) the private and public factors strongly favor dismissal.

1. Step One: The United Kingdom is an Available and Adequate Alternative Forum.

As the first step of the *forum non conveniens* analysis, the Court must determine whether an alternative forum exists, which depends on (a) the amenability of the defendants to service of process and (b) the availability of an adequate remedy in the alternative forum. *DTEX*, 508 F.3d at 794. Both factors are readily apparent here.

a) The relevant Defendants are amenable to process in the UK.

The only Defendants that were actually involved in the production of the advertisement are based in London: McGarry Bowen UK, The Mill UK, Honda Motor Europe and Rogue Films, Ltd. They are therefore amenable to suit in the United Kingdom. The other named defendants were not involved in the advertisement's production or distribution, as it was developed to advertise the Honda CR-V in Europe. Ex. 1 ¶¶ 9, 12-13 (Honda Motor Co. Ltd.); Ex. 5 ¶¶ 7 (Dentsu McGarry Bowen LLC); Ex. 7 ¶¶ 9 (The Mill Group, Inc.). Honda of the U.K. Manufacturing Ltd. was not involved, other than providing the two vehicles used in producing the advertisement, but it too is located in the UK. Ex. 2 ¶ 2.

All of the defendants challenge personal jurisdiction: the foreign entities because of their lack of sufficient contacts with the United States and the New York companies because of their lack of sufficient contacts with Texas. *See* Defendants' Rule 12(b)(2) Motion to Dismiss (filed November 4, 2013).

All the relevant parties, however, are amenable to suit in the United Kingdom. The presence of extraneous and redundant parties – especially ones not subject to personal jurisdiction in this forum – does not weigh against dismissal on *forum non conveniens* grounds. In fact, the presence of principal defendants over whom the Court lacks or has a doubtful basis for jurisdiction weighs in favor of transfer.

b) United Kingdom courts are readily available to the Plaintiffs and are adequate to adjudicate their claims.

The Complaint alleges copyright infringement under the U.S. Copyright Act, copyright infringement under the UK Copyright, Designs and Patents Act of 1988, and pendent common law claims. UK courts are available and adequate to adjudicate all of the Plaintiffs' claims.

As shown by the attached Declaration of UK Solicitor Giles Humphrey Crown, United Kingdom courts will entertain lawsuits filed by United States citizens, so the Plaintiffs' non-citizenship will not be an obstacle to suit. Ex. 8 ¶ 5. UK courts regularly adjudicate copyright infringement claims brought under UK law. *Id.* ¶ 3. And although it is clear from the Plaintiffs' pleading and the uncontested facts that most, if not all, of the Plaintiffs' claims arise under United Kingdom copyright law, to the extent the Plaintiffs attempt to make claims under U.S. law, UK courts will adjudicate claims of infringement of the U.S. Copyright Act. *Id.* ¶¶ 7-8. *See Lucasfilm v. Ainsworth*, [2011] UKSC 39 [105] ("We have come to the firm conclusion that, in the case of a claim for infringement of copyright [under U.S. law], the claim is one over which the English court has jurisdiction, provided that there is a basis for in personam jurisdiction over the defendant, or, to put it differently, the claim is justiciable").

Moreover, a UK forum is adequate, as well as available, because Plaintiffs can seek remedies in a fair, competent judicial system. "'Adequacy' does not require that the alternative forum provide the same relief as an American court." *DTEX*, 508 F.3d at 796. "A foreign forum is adequate when the parties will not be deprived of all remedies or treated unfairly, even though they may not enjoy all the benefits of an American court." *Id.* "The substantive law of the foreign forum is presumed to be adequate unless the plaintiff makes some showing to the contrary, or unless conditions in the foreign forum made known to the court, plainly demonstrate that the plaintiff is highly unlikely to obtain basic justice there." *Id.* (quoting *Tjontveit v. Den Norske Bank ASA*, 997 F. Supp. 799, 805 (S.D. Tex. 1998)).

UK law recognizes claims for copyright infringement and provides both monetary and injunctive relief for prevailing copyright owners. Ex. 8 ¶¶ 3-4. English law also provides for common law, equitable and other statutory causes of action. *Id.* at ¶ 5. U.S. courts routinely recognize that courts in the United Kingdom provide an adequate forum for litigating such disputes. *See*, *e.g.*, *Tjontveit*, 997 F. Supp. at 807 ("there are numerous decisions dismissing cases in favor of a civil law jurisdiction forum, and in favor of the United Kingdom as a forum") (quoting *Magnin v. Teledyne Continental Motors*, 91 F.3d 1424, 1430 (11th Cir. 1996)); *NCR Corp.*, 2009 WL 414672, *1 ("the courts of Scotland are an available and adequate forum" for plaintiff's copyright claims). Indeed, the Plaintiffs themselves assert infringement under UK copyright law, expressly acknowledging the adequacy of the forum law and seeking relief under its terms. Amend. Comp. ¶¶ 31-33.

Further, because the parties involved in the production of the advertisement – Honda Motor Europe, McGarry Bowen UK, Rogue Films Ltd. and The Mill UK – are not subject to personal jurisdiction in Texas, this Court is an inadequate forum. *Dunn v. Svitzer*, 885 F. Supp. 980, 991 (S.D. Tex. 1995) ("In this case, the Southern District of Texas is not an adequate forum because none of the defendants with direct involvement with the accident are subject to personal jurisdiction here."). The courts of the United Kingdom, on the other hand, would have jurisdiction over all the relevant parties. Even the presence of one principal defendant over which this Court lacks jurisdiction, but which is subject to the courts of the United Kingdom, counsels dismissal in favor of the UK, to avoid duplicative litigation.

2. Step Two: The United Kingdom is the Forum Best Suited to this Litigation.

The second step in determining a *forum non conveniens* motion is to consider "whether certain private and public interest factors weigh in favor of dismissal." *DTEX*, 508 F.3d at 794.

a) The "Private Factors" Warrant Dismissal in Favor of the UK.

The private interest *forum non conveniens* factors include: (i) the relative ease of access to sources of proof; (ii) the availability of compulsory process for attendance of unwilling witnesses and the cost of obtaining attendance of willing witnesses; (iii) the possibility of a view of the premises; (iv) all other practical problems that make trial of a case easy, expeditious and inexpensive, including enforceability of judgment and whether the plaintiff has sought to "vex," "harass," or "oppress" the defendant. *DTEX,* 508 F.3d at 794 (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947); *In re Air Crash*, 821 F.2d at 1162)). Each of these factors weighs in favor of dismissal in this case.

(1) The witnesses and documents are in the United Kingdom.

The Complaint alleges that venue is appropriate in this district because "a substantial part of the property that is the subject of the actions is situated in this district," and "a substantial part of the events giving rise to the claims occurred in this judicial district." Amend. Comp. ¶ 2. But neither of these claims is true.

The property, Inversion, *was* situated in this district, but it no longer exists. It is uncontested that the work was a temporary creation and was destroyed shortly after it was created.[3] No site visit or viewing is possible.

Moreover, none of the events giving rise to the claims occurred in this district; the advertisement was developed primarily in London, partly in Canada, and was aired in Europe. Ex. 6 ¶¶ 8-10, 18-20. Honda Motor Europe commissioned the advertisement; McGarry Bowen UK developed the advertisement in conjunction with London production and editing companies and a UK producer and consultant; the advertisement was aired in the UK and Europe to promote European sales of the Honda CR-V. *Id.*

All of the relevant documents are located in the UK. *See* Ex. 6 ¶¶ 23-24. None of the Defendants have any documents relevant to this lawsuit located in Texas. Ex. 1 ¶ 14; Ex. 2 ¶ 14; Ex. 3 ¶ 13; Ex. 4 ¶ 13; Ex. 5 ¶ 9; Ex. 6 ¶ 24; Ex. 7 ¶ 12; Ex. 9 ¶ 18. In addition, records of the media purchases for airing the Honda CR-V advertisement at issue will be in the possession of non-parties SMV UK LTD, who made the media purchases, or Honda Motor Europe. Ex. 6 ¶ 23. The Plaintiffs are seeking to recover "profits and advantages" from the alleged infringement, including "fees generated to create and place the advertising campaign, the video, print ads, and in the sale of Honda motor vehicles attributable to the use of the copyrighted work." Amend. Comp. ¶ 30. While Defendants vigorously contest liability and the Plaintiffs' right to recover any damages, *all* the documents related to these ambitious claims for damages, and the witnesses who would have knowledge of the documents and records, are located in London or elsewhere in Europe.[4]

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[3] *See* http://en.wikipedia.org/wiki/Inversion_(artwork) (visited August 30, 2013).

[4] An inkling of the scope of the burden of production and inquiry that the Plaintiffs seek to impose on six UK, and two New York and one Japanese defendant is shown by their initial

Similarly, all the key witnesses on the issues of alleged liability, alleged intentional infringement, and alleged damages are located overseas. The list is extensive and includes five corporate defendants and numerous unaffiliated companies and persons:

- **Simon North**, Executive Vice Chairman of McGarry Bowen UK, participated in the "pitch" to Honda Motor Europe, negotiated the agreement with Honda Motor Europe and has extensive knowledge of the conception, creation, production and distribution of the advertisement. He resides in London. Ex. 6 ¶¶ 1, 8-18.

- **Remco Graham**, a Creative Director for McGarry Bowen UK, originated and developed the "portal" idea for the advertisement with Richard Holmes, and was involved in all creative decisions regarding the advertisement. He resides in London. Ex. 6 ¶ 18.

- **Richard Holmes**, a Creative Director for McGarry Bowen UK, originated and developed the "portal" idea for the advertisement with Remco Graham, and was involved in all creative decisions regarding the advertisement. He resides in London. Ex. 6 ¶ 18.

- **Paul Jordan**, Executive Creative Director for McGarry Bowen UK, along with Angus Macadam supervised Mr. Graham and Mr. Holmes and was updated and involved on a regular basis regarding the development of the "portal" concept and the advertisement. He is located in London. *Id*.

- **Angus Macadam**, Executive Creative Director for McGarry Bowen UK, along with Paul Jordan supervised Mr. Graham and Mr. Holmes and was updated and involved on a regular basis regarding the development of the "portal" concept and the advertisement. He is located in London. *Id*.

- **Kate Hitchings**, a producer with Rogue Films Ltd., have knowledge regarding the development of the "portal" concept and the production of the advertisement. She is the only person involved in the advertisement who communicated with the Plaintiffs. She is located in London. *Id*. at ¶ 19.

- **Charles Crompton**, Managing Director and Executive Producer at Rogue Films, London, United Kingdom, also has knowledge of the development and production of the advertisement.

- **Alex McNamara**, Account Executive for McGarry Bowen UK, was heavily involved in the budgeting and production of the television advertisement and the logistics

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requests for production and interrogatories, even though discovery is currently limited to personal jurisdiction and *forum non conveniens* issues. *All* of the information and documents necessary to answer these requests must come from New York or overseas.

involved in the production. He knows about the day-to-day management, coordination and production of the advertisement, and communicated with Honda Motor Europe about the advertising campaign. He is located in London. *Id.*

- **Richard Oakes**, Account Executive for McGarry Bowen UK, was heavily involved in the budgeting and production of the television advertisement and the logistics involved in the production. He knows about the day-to-day management, coordination and production of the advertisement, and communicated with Honda Motor Europe about the advertising campaign. He is located in London. *Id.*

- **Sam Brown**, director affiliated with Rogue Films, Ltd., directed the advertisement, and has personal knowledge of the development of the advertisement, the initial "portal" concept as developed by McGarry Bowen UK, and his own contributions to the concept and vision of the advertisement. He is located in London, but is not under McGarry Bowen UK's control. *Id.* at ¶¶ 9, 19.

- **Helen Whiteley**, independent television producer, has extensive knowledge of the development of the advertisement including the "portal" concept and Rogue Films' communications with the Plaintiffs. She is located in the UK but is not under McGarry Bowen UK's control. *Id.* at ¶ 20.

- **David Prys-Owen**, is the independent consultant hired to review the advertisement's proposed budget. He is located in the UK but is not under the control of McGarry Bowen UK or Honda Motor Europe. *Id.* at ¶ 21.

- **Ellie Tory** was Simon North's primary contact at Honda Motor Europe. She was kept informed of the development and production of the advertisement and was the main source of feedback from Honda Motor Europe. She knows about Honda Motor Europe's request for an advertisement to launch the Honda CR-V in Europe, its interaction with McGarry Bowen UK, the decision to use the "portal" concept, the development of the advertisement, and the European advertising campaign. She is located in the UK, *id.* at ¶ 22, but is no longer employed by Honda Motor Europe.

- **Ben Stallard**, **Chris Batten**, **Matthew Williams**, **Adam Grint** and **Alex Hammond** have knowledge of The Mill UK's involvement in the production of the television advertisement at issue in London and Vancouver. Ex. 4 ¶ 12. Mr. Williams and Mr. Grint are no longer employed by The Mill UK. *Id.*

- **David Palmer**, of UK-based Starcom MediaVest UK Ltd, was in charge of making media purchases for airing the Honda CR-V advertisement. Mr. Palmer and those under his supervision have knowledge regarding where in Europe the advertisement was broadcast. *Id.* at ¶ 23. He is located in the UK, but is not under McGarry Bowen's control.

- **Ian Howells**, corporate secretary for Honda of the U.K. Mfg., a witness capable of establishing its lack of material involvement in the production of the advertisement at issue.

No Defendant has any witnesses in Texas; the only witnesses in the United States are people who could testify that defendants did *not* develop or air the advertisement. Ex. 1 ¶ 10; Ex. 5 ¶ 9; Ex. 7 ¶12.

While the Plaintiffs are located in this forum, there are only two of them, and their testimony will have minimal relevance in establishing infringement or damages. Their claim of infringement is based on the Defendants' *failure* to obtain consent, not the existence or breach of an agreement made by foreign entities with United States citizens. Proving and rebutting the Plaintiffs' allegation of infringement will involve determining the source of the advertisement's concept, whether there was copying, and comparing the advertisement with the copyrighted work to determine whether there was copying of protectable content. *E.g., Randolph v. Dimension Films*, 634 F. Supp.2d 779, 787 (S.D. Tex. 2009). Defending Plaintiffs' allegations of "conspiracy" and "intentional infringement" will require evidence and testimony regarding multiple individuals' states of mind, from eight separate corporate entities, none of which are in Texas. The Plaintiffs' demand to recover damages based on sales of Honda vehicles means that invariably additional witnesses and documents will be necessary to address the information that would underlie such damages claims, no matter how far-fetched they might be. And now the Plaintiffs have introduced three Doe defendants who are alleged to be located in Europe, not the United States (let alone Texas), again increasing the number of overseas witnesses and the potential number of non-Texas defendants from eight to eleven.

There is not a small imbalance of access to evidence between this forum and the United Kingdom – it is huge. The number of UK versus Texas witnesses (dozens versus two), the far greater relevance of the foreign witnesses' testimony compared to the plaintiffs' knowledge of the facts underlying the alleged infringement and purported damages, as well as the remote location of all documents relevant to the plaintiffs' liability and damages claims weigh heavily in favor of a UK forum. *See Zermeno v. McDonnell Douglas Corp.*, 246 F. Supp.2d 646, 664 (S.D. Tex. 2003); *NCR Corp.*, 2009 WL 414672 (dismissing U.S. copyright lawsuit in favor of Scottish forum where 2/3 of witnesses identified by plaintiff in initial disclosures were domiciled in Scotland).

(2) Compulsory process is unavailable for attendance of foreign witnesses in Texas, and the costs of obtaining attendance of witnesses weighs against Texas forum.

As noted above, there are a significant number of non-party foreign witnesses that cannot be compelled to attend trial in the United States, including independent producer **Helen Whitely**, independent consultant **David Prys-Owen**, former Honda Motor Europe employee **Ellie Tory**, and **David Palmer** of **Starcom MediaVest UK Ltd.**, which purchased the broadcast time for the advertisement. Former The Mill UK employees **Matthew Williams** and **Adam Grint** are no longer employed by the company. Ex. 4 ¶ 12.

Because these foreign witnesses are neither parties nor employees of parties, they cannot be compelled or directed to appear in this Court. *See Dunn*, 885 F. Supp. at 991 (S.D. Tex. 1995) (dismissing on *forum non conveniens* grounds in part because court "could not compel attendance of the witnesses with first-hand knowledge because they reside in Denmark and their employer is not subject to personal jurisdiction"). "[T]o fix the place of trial at a point where litigants cannot compel personal attendance and may be forced to try their cases on deposition is to create a condition not satisfactory to litigants." *DTEX*, 508 F.3d at 799 (quoting *Perez & Compania (Cataluna), S.A. v. M/V Mexico I*, 826 F.2d 1449, 1453 (5th Cir. 1987)). That these witnesses are in a foreign country, not the United States, means the ability to secure their testimony at all is dependent upon foreign law and foreign judicial proceedings.

Even for witnesses who can be directed or who are willing to appear in Texas, the cost of securing their attendance would be enormous. This expense and the absence of Texas witnesses weighs against Texas forum. *DTEX*, 508 F.3d at 800. Even if Plaintiffs could identify Texas witnesses other than themselves with some relevant knowledge – which they cannot – the inconvenience of transporting such witnesses to the UK would not alone prevent dismissal. *See Coakes v. Arabian American Oil. Co.*, 831 F.2d 572, 574-75 (5th Cir. 1987) (affirming *forum non conveniens* dismissal despite plaintiffs' claim that transporting thirteen American witnesses to England for trial constituted intolerable financial burden); *Stewart v. Adidas A.G.*, No. 96 Civ. 6670, 1997 WL 218431, *8 (S.D.N.Y. 1997) (where plaintiff's copyright infringement claims "involve foreign law and foreign events, the inconvenience to [the plaintiff] is significantly outweighed by the other factors").

(3) There is no possibility of viewing the premises.

As noted, Inversion is no more. There is no possibility of viewing the work at issue. Accordingly, this factor weighs in favor of dismissal or, at most, is neutral.

(4) The practical problems of a trial in Texas weigh against a Texas forum.

The relevant documents and witnesses are located in the UK; none are in Texas. Most of the alleged infringing activity happened in the UK; none happened in Texas. The Defendants who engaged in the alleged infringement are located in the UK. In contrast, only the Plaintiffs reside in Texas. The financial burden of two Plaintiffs testifying in the UK is far less than the costs and burdens of many UK witnesses traveling to Texas. *See DTEX*, 508 F.3d at 801 (rejecting plaintiff's claim of financial hardship based on two American witnesses having to testify in Mexico when compared to many Mexican witnesses having to travel to Texas). There will be no language barrier or need for translations or interpreters for a trial in London.

Furthermore, because the relevant Defendants directly involved with the advertisement are subject to jurisdiction in the UK, Plaintiffs will face no difficulty enforcing any potential judgment by a UK Court. *See* Ex. 6 ¶¶ 4, 9; Ex. 8 ¶¶ 9; *Dickson Marine, Inc. v. Panalpina, Inc.*, 179 F.3d 331, 343 (5th Cir. 2007) ("[B]ecause Air Sea is based in Switzerland, it is amenable to service of process, and any judgment levied against Air Sea will be enforceable in Switzerland."). Questions of personal jurisdiction over the foreign defendants will remain long past entry of any judgment in this forum, including enforcing any injunctive relief the Plaintiffs seek, given that judgments entered by courts lacking personal jurisdiction will not be enforced in a foreign jurisdiction.[5]

Finally, whether or not the Plaintiffs' initial action in suing nine separate defendants (including seven parties wholly uninvolved in developing and airing the advertisement) and then amending their Complaint to add more superfluous parties rises to the level of "vexation" or "harassment" of defendants, *see DTEX*, 508 F.3d at 794, certainly the absence of relevant U.S.-based defendants and the limits of this court's jurisdiction over the defendants counsels in favor of dismissal. Substantial questions exist as to the Court's personal jurisdiction over these foreign entities (and more will likely be raised, given the Plaintiffs' naming of three new foreign Doe defendants). This final private factor thus weighs heavily in favor of dismissal. *See Glazier*

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[5] *See* United States Bureau of Consular Affairs, http://travel.state.gov/law/judicial/judicial_691.html (visited November 1, 2013) ("There is no bilateral treaty or multilateral international convention in force between the United States and any other country on reciprocal recognition and enforcement of judgments. Although there are many reasons for the absence of such agreements, a principal stumbling block appears to be the perception of many foreign states that U.S. money judgments are excessive according to their notions of liability. Moreover, foreign countries have objected to the extraterritorial jurisdiction asserted by courts in the United States.")

Group, Inc. v. Mandalay Corp., No. H-06-2752, 2007 WL 2021762 (S.D. Tex. July 11, 2007) (granting motion to transfer for *forum non conveniens* after recognizing weakness of plaintiffs' assertion of personal jurisdiction over defendants).

b) The "Public Factors" Also Warrant Dismissal in Favor of a UK forum.

The public interest factors include: (i) the administrative difficulties flowing from court congestion; (ii) the local interest in having localized controversies resolved at home; (iii) the interest in having a the trial of a diversity case in a forum that is familiar with the law, the avoidance of unnecessary problems in conflicts of law, or in application of foreign law; and (iv) the burden of jury duty on citizens in an unrelated forum. *DTEX*, 508 F.3d at 794. The public factors, like the private factors, weigh heavily in favor of dismissal.

(1) Administrative difficulties.

As noted, the relevant witnesses and documents are in the United Kingdom, many of them not under control of the named Defendants, and this Court, unlike a UK court, would not have the power to compel nonparty attendance and production. *DTEX,* 508 F.3d at 802 (finding difficulty in obtaining evidence from Mexico and application of Mexican law were administrative difficulties weighing in favor of dismissal).

In addition, the Plaintiffs' claims arise under UK law – the advertisement was developed and distributed overseas, for an overseas product manufactured and sold overseas. By the Plaintiffs' own admission, this Court is being asked to interpret and apply the UK Copyright, Design and Patents Act of 1988 with regard to both liability and damages. Amend. Comp. ¶¶ 31-33; pp. 18-19. Without doubting this Court's competence to learn new law, the need to determine, interpret and apply foreign law favors dismissal in favor of a forum that can apply its own law. *Tjontveit*, 997 F. Supp. at 810 ("[M]any *forum non conveniens* decisions have held that the need to apply foreign law favors dismissal.").

(2) The United Kingdom has the local interest in having alleged violations of UK copyright law resolved at home.

While the Plaintiffs' Amended Complaint makes clear that they feel aggrieved, if McGarry Bowen UK and the others involved in the production of the Honda advertisement violated any law, it was UK law, not U.S. law. The United States Copyright Act does not apply to actions taken in the United Kingdom. As the Amended Complaint itself alleges, the Plaintiffs' ability to assert copyright protection for their work in the United Kingdom is a result of the U.S. and the UK being signatories to the Berne Convention. Amend. Comp. ¶ 32. That treaty requires signatory countries to protect – through their *domestic* laws – copyrights of citizens of foreign signatory countries. The Berne Convention does not make U.S. law applicable overseas; rather, it provides that signatories' citizens are "entitled to the same copyright protection in each other member state as such other state accords to its own nationals." Nimmer on Copyright § 17.05[A] (2013).

Accordingly, the law enforcement interest is local to the United Kingdom – the UK courts have a far stronger interest in determining and enforcing alleged violations of UK law, as well as entering and enforcing any injunctive relief against domestic corporations, than this court. *See Stewart*, 1997 WL 218431, *6-7 (German courts have interest in determining individuals' copyright claims arising under German law against a German company based on sales in Germany and elsewhere).

(3) The need to determine, interpret and apply UK law weighs heavily in favor of a UK forum.

There is a "strong interest in trying [a] case in a forum that is familiar" with the law that applies to the case. *Zermeno v. McDonnell Douglas Corp.*, 246 F. Supp.2d 646, 664 (S.D. Tex. 2003); *see Tjontveit*, 997 F. Supp. at 810 ("courts have recognized that problems inherently arise when a court is forced to apply a law with which it is unfamiliar"). That strong interest favors dismissal in favor of a UK forum.

(4) Texas citizens need not be burdened with jury duty to determine whether UK companies violated UK law.

This is ultimately a foreign dispute: allegations that foreign entities, while producing a foreign commercial, violated UK copyright law. While the Plaintiffs live in this forum, should the case proceed to a jury trial, there is no overriding reason to have a Texas jury determine whether foreign defendants violated foreign law. *See Tjontveit*, 997 F. Supp. at 813 (finding a Texas citizen's "primarily foreign dispute" would be an "undue burden upon the citizens selected for jury duty to devote their time and attention to deciding this case rather than the many cases with a more compelling relationship to local interests"). A local U.S. forum has "very little interest in adjudicating" a plaintiff's foreign law claims where the "actions [the] plaintiff complains about took place largely outside the United States and involve foreign law." *Stewart*, 1997 WL 218431, *7. This is exactly the case here – the rights Plaintiffs seek to enforce exist in a foreign jurisdiction and were created by foreign law.

In contrast, "the defendant's home forum always has a strong interest in providing a forum for redress of injuries caused by its citizens." *Id.* at 813 (quoting *Reid-Walen v. Hansen*, 933 F.2d 1390, 1400 (8th Cir. 1991)). "Any economic burden to the [foreign] forum is justified because the defendant has undertaken both the benefits and burdens of citizenship and of the forum's laws." *Id.*

V. Conclusion.

For these reasons, the moving Defendants ask that this Court dismiss this lawsuit on the ground of *forum non conveniens*, and for such other and further relief to which they may be justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2013, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

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EXHIBITS IN SUPPORT OF
DEFENDANTS' MOTION TO DISMISS
DUE TO *FORUM NON CONVENIENS*

1. Declaration of Yuichiro Kawamura.
2. Declaration of Ian Howells.
3. Declaration of Martin Moll.
4. Declaration of Ben Stallard.
5. Declaration of Kristin Moore.
6. Declaration of Simon North.
7. Declaration of Damien Macaulay.
8. Declaration of Giles Crown.
9. Declaration of Charles Crompton.